No. 19-1100

IN THE

Supreme Court of the United States

LEROY D. CROPPER,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

On Petition for Writ of Certiorari to the Superior Court of Arizona, Maricopa County

BRIEF FOR AMICUS CURIAE ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Arizona Attorneys for Criminal Justice (AACJ), the Arizona affiliate of the National Association of Criminal Defense Lawyers, is a not-for-profit membership organization of criminal defense lawyers and associated professionals. Its mission is to give a voice to the criminally accused and those who defend them. To that end, AACJ is dedicated to protecting the rights of the accused in the courts and in the legislature; promoting excellence in the practice of criminal law through education, training, and mutual assistance; and fostering public awareness of citizens' rights, the criminal justice system, and the role of the criminal defense lawyer.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns an exceptionally clear instance of ineffective assistance of counsel. In *Simmons* v. *South Carolina*, 512 U.S. 154 (1994), this Court held that a capital defendant has a due process right to inform the jury that he is ineligible for parole when the defendant's future dangerousness is at issue. As the Court recognized, "there may be no greater assurance of a defendant's future nondangerousness to the pub-

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party, or any other person other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

lic than the fact that he never will be released on parole." *Id.* at 163-164. Yet in this case, even though the State placed petitioner Leroy Cropper's future dangerousness squarely at issue, trial counsel inexcusably failed to request a *Simmons* instruction, and petitioner was sentenced to death. As petitioner has explained, Pet. 10-27, counsel's failure constituted ineffective assistance of counsel. *Strickland* v. *Washington*, 466 U.S. 668 (1984).

In this brief, amicus AACJ further elaborates on why trial counsel's failure to request a *Simmons* instruction fell well below reasonable standards of competent representation and amounted to deficient performance under *Strickland*. In no sense can counsel's failure to inform the jury of parole eligibility be understood as an informed strategic decision. Quite the contrary. Counsel's failure to invoke *Simmons* evidently arose from a fundamental misunderstanding of petitioner's sentencing exposure: counsel mistakenly believed that petitioner was eligible for parole and therefore not within the ambit of *Simmons*' rule. In fact, Arizona had abolished parole for murder in 1994—fourteen years before petitioner's sentencing. Counsel's "ignorance of a point of law" so fundamental to the case "is a quintessential example of unreasonable performance under *Strickland*"—as is counsel's consequent failure to convey to the jury critical information about petitioner's parole ineligibility. *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014).

Nonetheless, on state postconviction review, the Arizona trial court held that counsel's failure to invoke *Simmons* was reasonable in light of *State* v. *Cruz*, 181 P.3d 196, 207 (Ariz. 2008), which held that

Simmons did not apply in Arizona. But *Cruz* cannot excuse counsel's performance. As petitioner has explained, the Arizona Supreme Court's decision in *Cruz* did not even issue until well after trial counsel had proposed jury instructions and the trial court had issued preliminary instructions. In other words, counsel had already failed to request a *Simmons* instruction before *Cruz* was decided.

Even evaluating trial counsel's performance in light of *Cruz*, there can be no question that counsel performed deficiently. It would have been readily apparent to a reasonably competent attorney that *Cruz*'s reasoning—that *Simmons* was inapplicable because parole-ineligible defendants might someday receive release through other means—was rejected in *Simmons* itself. The request for a *Simmons* instruction therefore would have been a meritorious one under binding precedent of this Court, even if the request would have been rejected by the Arizona trial court applying *Cruz*. Because *Simmons* sets forth a federal constitutional rule binding on all courts, competent counsel would have preserved the *Simmons* issue so that it could be vindicated on direct review by this Court or on federal collateral review. Indeed, several years after petitioner's sentencing, this Court confirmed that *Simmons* indeed applies in Arizona, summarily reversing an Arizona Supreme Court decision that followed *Cruz* and explaining that *Simmons* itself foreclosed *Cruz*'s reasoning. *Lynch* v. *Arizona*, 136 S. Ct. 1818 (2016) (per curiam).

Arizona capital defense practice confirms that trial counsel's performance fell well below professional norms. Between 2008, when *Cruz* was decided, and

2016, when *Cruz* was reversed in *Lynch*, capital defense counsel in Arizona regularly raised and preserved *Simmons* objections for further appellate review—notwithstanding *Cruz*. Petitioner should not be denied the right guaranteed by *Simmons* and *Lynch* simply because his trial counsel performed deficiently. This Court's review is warranted.

ARGUMENT

PETITIONER'S TRIAL COUNSEL PERFORMED DEFICIENTLY IN FAILING TO REQUEST THAT THE JURY BE INFORMED OF PETITIONER'S PAROLE INELIGIBILITY

A. Trial counsel's failure to request a *Simmons* instruction was based on an unreasonable mistake of law concerning petitioner's parole eligibility

Trial counsel performed deficiently by failing to ensure that petitioner's sentencing jury was instructed that petitioner would be ineligible for parole if he were sentenced to life in prison. At the time of petitioner's sentencing, this Court's decisions in *Simmons* and its progeny established that when the prosecution argues that a defendant will be dangerous in the future, a capital defendant has a due process right to inform the jury that he is ineligible for parole. Yet trial counsel inexcusably failed to assert that right.

1. In *Simmons*, this Court held that where, as here, a capital defendant's future dangerousness is at issue, due process entitles a defendant to inform the jury that he is ineligible for parole. *Simmons* v. *South Carolina*, 512 U.S. 154, 163-164 (1994) (plurality op.).

Between 1994 and 2008, the Supreme Court discussed *Simmons* at length in several cases and twice reaffirmed or extended it. See *O'Dell* v. *Netherland*, 521 U.S. 151 (1997) (holding that *Simmons* is not a new rule within the meaning of *Teague* v. *Lane*, 489 U.S. 288 (1989)); *Ramdass* v. *Angelone*, 530 U.S. 156, 159 (2000) (plurality op.); *Shafer* v. *South Carolina*, 532 U.S. 36 (2001) (vacating death sentence based on *Simmons*). And in *Kelly* v. *South Carolina*, 534 U.S. 246 (2002), the Court held that where future dangerousness is at issue, a defendant is "entitled" to "convey [to the jury] a clear understanding of [the defendant's] parole ineligibility." *Id*. at 257. By the time of petitioner's 2008 sentencing, therefore, the Supreme Court had made it crystal clear that a capital defendant is entitled to inform the jury that he is ineligible for parole to counter the prosecution's argument that he will be dangerous in the future.

The principal and concurring opinions in *Simmons* leave no doubt that informing the jury of parole ineligibility is often critical to avoiding a death sentence when future dangerousness is at issue. As the plurality opinion explained, "[i]n assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not." *Simmons*, 512 U.S. at 163-164 (plurality op.). As a result, "there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole." *Ibid.* Indeed, "[w]hen the State seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be *the only way* that a violent criminal can successfully rebut the State's case." *Id.* at 177 (O'Connor, J., concurring) (emphasis added).

Because informing the jury of parole ineligibility may be critical to avoiding a death sentence when future dangerousness is at issue, a *Simmons* jury instruction is an important element of the sentencing defense. After all, in a capital sentencing proceeding, defense counsel's most fundamental duty is to convince the jury that a sentence other than death is warranted. See *Strickland* v. *Washington*, 466 U.S. 668, 695 (1984). *Simmons* provides a right to counter the prosecution's argument that the defendant will be dangerous in the future—often a centerpiece of the case in favor of a death sentence. *Kelly*, 534 U.S. at 255-256. Counsel who fails to raise the issue therefore forgoes an *entitlement* to a vital argument against a death sentence. And they lose the opportunity to obtain a jury instruction—a judicial imprimatur for their *Simmons* argument. See *Taylor* v. *Kentucky*, 436 U.S. 478, 488-489 (1978) ("arguments of counsel cannot substitute for instructions by the court").

Indeed, the need to inform the jury of parole ineligibility has long been well established in codified professional guidelines. ABA Guidelines compiled in 2003 state that because "future dangerousness is on the minds of most capital jurors," counsel "should make every effort to present information on" future dangerousness, and in particular, "should emphasize through evidence, argument, and/or instruction that the client will * * * never be eligible for parole."

Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, cmt., at 109 (Am. Bar Ass'n, 2003).[2] "[C]odified standards of professional practice * * * can be important guides" to the reasonableness of counsel's representation. *Missouri* v. *Frye*, 566 U.S. 134, 145 (2012); see, *e.g.*, *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003) (quoting *Strickland*, 466 U.S. at 688). That is particularly true here, where the standards have been incorporated into Arizona's rules governing performance in a capital case. Ariz. R. Crim. Proc. 6.8(a)(5) (counsel in capital cases must "be familiar with and guided by" the ABA Guidelines).

2. As petitioner explains (Pet. 15), trial counsel's failure to request a *Simmons* instruction was not the result of any strategic choice. Instead, that failure evidently arose from counsel's mistaken belief that petitioner would be eligible for parole. Pet. 8.

a. Counsel's belief that petitioner was eligible for parole rested on a clear and inexcusable error of law. In fact, since 1994, the only two sentencing options for murder were life in prison without parole or death. Because petitioner's offense was committed in 1997, he was not eligible for parole. Pet. App. 43a; see Ariz. Rev. Stat. Ann. § 41-1604.09(I).

Counsel's mistake about parole was itself deficient performance. "An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a

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2 https://fdprc.capdefnet.org/sites/cdn_fdprc/files/Assets/public/overview/aba_guidelines/aba_guidelines.pdf.

quintessential example of unreasonable performance under *Strickland*." *Hinton* v. *Alabama*, 571 U.S. 263, 274 (2014) (attorney performed deficiently where he "knew that he needed more funding to present an effective defense," but erroneously believed such funding was not available under state law); *Kimmelman* v. *Morrison*, 477 U.S. 365, 385 (1986) (finding deficient performance where counsel mistakenly believed that the "State was obliged to take the initiative and turn over all of its inculpatory evidence to the defense").

Here, the unavailability of parole was a critical aspect of petitioner's sentencing exposure: he faced possible sentences of death or life without parole—not death or life *with* parole. And counsel's misunderstanding of the sentencing scheme was surely unreasonable; as the Arizona PCR court found, "counsel should have been aware of the sentencing options, including the availability or non-availability of parole." Pet. App. 43a. Indeed, courts have routinely held that trial counsel's ignorance of the basic content of the applicable sentencing scheme ordinarily constitutes deficient performance under *Strickland*'s first prong. See, *e.g.*, *United States* v. *Aguiar*, 894 F.3d 351, 357 (D.C. Cir. 2018) ("The duty to provide reasonably effective representation at sentencing presumes knowledge of statutory penalties."); *United States* v. *Abney*, 812 F.3d 1079, 1089 (D.C. Cir. 2016); *Magana* v. *Hofbauer*, 263 F.3d 542, 550 (6th Cir. 2001) (counsel's "complete ignorance of the relevant law" concerning the maximum sentence "certainly fell below an objective standard of reasonableness under prevailing professional norms"); *Johnson* v. *United States*, 313 F.3d

815, 818 (2d Cir. 2002). Counsel's mistake was particularly egregious here, as future dangerousness was at issue, and so the unavailability of parole should have played a critical role in counsel's sentencing defense. See pp. 5-6, *supra*.

b. Because trial counsel proceeded under a basic misunderstanding of the sentencing scheme, his failure to request a *Simmons* instruction cannot be understood as a reasonable strategic choice. As this Court has explained, choices made at trial are only as reasonable as the premises on which they rest, and when counsel makes decisions based on unreasonable ignorance of the law, counsel performs deficiently. *Strickland*, 466 U.S. at 690-691.

Indeed, this Court and the courts of appeals have held time and again that trial decisions based on an unreasonable mistake of law constitute deficient performance. See, *e.g.*, *Hinton*, 571 U.S. at 275 (choice of expert based on "inexcusable mistake of law" concerning state funding was deficient performance); *Williams* v. *Taylor*, 529 U.S. 362, 395 (2000) (finding deficient performance where counsel failed to investigate state records for mitigation evidence "not because of any strategic calculation but because they incorrectly thought that state law barred access to such records"); *Kimmelman*, 477 U.S. at 385 (failure to conduct pretrial discovery based on mistake of law was unreasonable); *Bullock* v. *Carver*, 297 F.3d 1036, 1049-1051 (10th Cir. 2002) (listing cases that "[a]n attorney's demonstrated ignorance of law directly relevant to a decision will eliminate *Strickland*'s presumption that the decision was objectively reasonable because it might have been made for strategic purposes"); *Lawhorn* v. *Allen*, 519 F.3d 1272, 1295 (11th Cir. 2008) (listing cases finding that "[t]actical or strategic decisions based on a misunderstanding of the law" were unreasonable); *United States* v. *Span*, 75 F.3d 1383, 1390 (9th Cir. 1996); *Loyd* v. *Whitley*, 977 F.2d 149, 158 (5th Cir. 1992).

In failing to request the *Simmons* instruction where future dangerousness was at issue, therefore, petitioner's trial counsel clearly fell below any reasonable standard of performance. Petitioner was ineligible for parole under clear state law that had been in place since 1994. The sentencing court itself found that petitioner's future dangerousness was at issue, as the prosecution explicitly argued that petitioner had already had "second chances" on parole, and that he would be likely to offend again in the future. Pet. 7-8, 14. The *Simmons* rule was well established by 2008, as this Court had reaffirmed or expanded the decision several times in the early 2000s. In sum, this was not a situation in which the legal or factual justification for raising an objection was unclear.[3] To the

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[3] Nor would there have been any downside to raising the *Simmons* argument. Counsel had the opportunity to submit proposed instructions in writing, see Ariz. R. Crim. Proc. 21.2 (requiring written submission of jury instructions "at a time the court directs," which is commonly prior to commencement of trial), and requested other jury instructions related to parole (including that petitioner would be eligible for these 35 years), indicating that he did not perceive downside to doing so. Nor would counsel have had to "react or not act at a moment's notice in circumstances where the[] legal position is uncertain." See *Bates* v. *Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1299 (11th Cir. 2014). Where a "claim was a clear winner and presenting it would have

contrary, the objection was essentially "ready-made," because the rule was straightforward and well-publicized not only in this Court's decisions, but in sources such as the ABA Guidelines. See *Harris* v. *Sharp*, 941 F.3d 962, 977 (10th Cir. 2019), *petition for cert. filed*, No. 19-1105 (March 10, 2020). Petitioner would have been entitled to a parole-ineligibility instruction had counsel simply asked for it. Counsel's failure to do so is a stark example of deficient performance.[4]

B. Arizona Supreme Court precedent does not excuse counsel's failure to request a *Simmons* instruction

In this case, the Arizona PCR court did not dispute that counsel should have known that petitioner was ineligible for parole, and that petitioner would have been entitled to a *Simmons* instruction. But the lower courts nonetheless held that counsel's failure to ensure that the jury knew of petitioner's parole ineligibility was objectively reasonable in light of *State* v.

risked nothing, counsel's eschewal of it amounted to constitutionally deficient performance." See *Prou* v. *United States*, 199 F.3d 37, 48 (1st Cir. 1999).

[4] Indeed, other Arizona attorneys raised *Simmons* objections during this time period (between 2006 and 2008). See Appellant's Opening Brief at 75-77, *State* v. *Lynch*, 234 P.3d 595 (Ariz. 2010) (No. CR–06–0220–AP), 2008 WL 6587570 (in 2006, trial attorney raised and preserved objection to exclusion of "all evidence involving future prison conditions, life imprisonment and lack of future dangerousness."); Appellant's Opening Brief at 105-07, *State* v. *Dann*, 207 P.3d 604 (Ariz. 2009) (No. CR–07–0153–AP), 2008 WL 4994336 (in 2007, trial counsel sought to inform the jury of parole ineligibility during the penalty phase and *Simmons* objection was preserved on appeal).

Cruz, 181 P.3d 196, 207 (Ariz. 2008), which held that *Simmons* did not apply in Arizona. As petitioner explains (Pet. 15-16), *Cruz* had not yet been decided when trial counsel proposed preliminary jury instructions and the trial court delivered them to the jury, and thus *Cruz* cannot excuse counsel's failure to raise *Simmons*. But even if *Cruz* had been binding adverse state court precedent at the relevant time, that would not render counsel's failure to preserve a *Simmons* objection reasonable.

1. Competent counsel examining *Cruz* in light of *Simmons* would have understood that *Cruz* was wrong, and that a *Simmons* objection should be preserved for further federal court review.

Cruz held that the *Simmons* rule did not apply in Arizona because "[n]o state law would have *prohibited* Cruz's release on parole after serving twenty-five years." 181 P.3d at 207 (emphasis added). However, in the words of the PCR court, "the legislature abolished parole as to murders committed after 1994." Pet. App. 43a. Thus, *Cruz*'s holding turned on the possibility of future legislative change. See *State* v. *Hargrave*, 234 P.3d 569, 582-583 (Ariz. 2010) (citing *Cruz* as a case about "statutory potential for * * * release"). In later decisions, the Arizona Supreme Court additionally justified the *Cruz* rule based on the possibility that a prisoner could obtain non-parole release through executive clemency. See *State* v. *Lynch*, 357 P.3d 119, 138-139 (Ariz. 2015) (*Simmons* did not apply because even "if parole remained unavailable, *Lynch* could have received another form of release, such as executive clemency"), *rev'd*, 136 S. Ct. 1818 (2016).

But *Simmons* itself rejected arguments that the potential for legislative reform or the availability of executive clemency negates a defendant's right to inform the jury that he is ineligible for parole. 512 U.S. at 166 ("To the extent that the State opposes even a simple parole-ineligibility instruction because of hypothetical future developments," such as "legislative reform, commutation, [and] clemency," "the argument has little force."). Thus, at the time *Cruz* was decided, it was readily apparent that the decision was inconsistent with this Court's controlling precedent. Indeed, this Court confirmed as much in *Lynch*, when it summarily reversed the Arizona Supreme Court's refusal to follow *Simmons*: "*Simmons* expressly rejected the argument that the possibility of clemency diminishes a capital defendant's right to inform a jury of his parole ineligibility * * * and said that the potential for future 'legislative reform' could not justify refusing a parole-ineligibility instruction." *Lynch*, 136 S. Ct. at 1819.

Competent counsel would have been aware of *Simmons*, and the lack of parole for murder in Arizona, for the reasons discussed above. Counsel therefore could be expected to examine *Cruz* in light of *Simmons*—especially given that *Simmons*, as U.S. Supreme Court precedent, was binding on the Arizona courts. See *Everett* v. *Beard*, 290 F.3d 500, 513 (3d Cir. 2002) (competent counsel is familiar with the law of the relevant jurisdictions). A reasonable attorney at the time of petitioner's sentencing therefore would have concluded that *Cruz* was flatly inconsistent with *Simmons*.

2. Competent counsel would have further concluded that a request for a *Simmons* instruction would ultimately be vindicated in federal court. To be sure, a request for a *Simmons* instruction could have been rejected by the trial court once *Cruz* was decided.[5] But the request would have been *meritorious*, in that governing precedent of this Court gave petitioner a federal due process right to inform the jury of his parole ineligibility. In light of *Simmons* and its progeny, a *Simmons* objection would have been predicated on "[s]olid, meritorious arguments based on directly controlling precedent." *United States* v. *Conley*, 349 F.3d 837, 841 (5th Cir. 2003) (quotation omitted) (trial counsel was deficient for "fail[ing] to recognize and argue" a sentencing error apparent from "this Court's precedent"); *Simpson* v. *Carpenter*, 912 F.3d 542, 599 (10th Cir. 2018) (trial counsel was deficient in failing to preserve meritorious appellate issue); *French* v. *Warden, Wilcox State Prison*, 790 F.3d 1259, 1268-1269 (11th Cir. 2015) (similar); *Bloomer* v. *United States*, 162 F.3d 187, 193-194 (2d Cir. 1998) (similar).

Reasonably competent counsel therefore would have preserved the *Simmons* issue for eventual federal review. Given the federal constitutional nature of the right, the Arizona state courts would not have the last word on the issue; their rulings on federal law

[5] *Cruz* did not instruct trial courts to reject *Simmons* instructions, and the trial court in its discretion could have decided to give a *Simmons* instruction. After all, "[a] trial judge's duty is to give instructions sufficient to explain the law." *Kelly*, 534 U.S. at 256. Even in *Lynch*, the Arizona Supreme Court noted that "[a]n instruction that parole is not currently available would be correct." 357 P.3d at 138.

are subject to review on direct appeal by this Court and on postconviction review by the lower federal courts. Thus, even if a reasonable attorney might have expected any *Simmons* argument to be rejected by the Arizona trial and appellate courts applying *Cruz*, that attorney would also have expected that federal courts applying *Simmons* would hold that petitioner's jury should have been informed of his parole ineligibility. The need to preserve the issue for direct appeal or postconviction review therefore would have been clearly evident.

Counsel who unreasonably fails to raise and preserve meritorious issues performs deficiently, even if "the issue to be preserved [would] not [have been] vindicated until later stages of the appellate process." *Freeman* v. *Lane*, 962 F.2d 1252, 1257-1259 (7th Cir. 1992) (counsel performed deficiently by failing to preserve Fifth Amendment claim recognized by Seventh Circuit precedent, even if the claim "would not have prevailed under state precedents"); *Orazio* v. *Dugger*, 876 F.2d 1508, 1513 (11th Cir. 1989) (counsel was ineffective for failing to raise a *Faretta* claim that could have been vindicated in federal postconviction review, even if Florida courts would have rejected it). That conclusion is reinforced by standards of practice, which emphasize that preserving objections for appellate and postconviction review is particularly important in the capital context because of the "near certainty that all available avenues of post-conviction relief will be pursued in the event of conviction and imposition of a death sentence." *ABA Guidelines*, Guideline 10.8.

Importantly, arguing that the jury should be informed of petitioner's parole ineligibility would not have required counsel to anticipate or advocate for a change in governing federal law. Ultimately prevailing in the federal courts would not have depended upon convincing this Court to recognize a novel rule or expand an existing precedent. Cf. *Gov't of Virgin Islands* v. *Forte*, 865 F.2d 59, 62 (3d Cir. 1989) (noting that generally, "an attorney at a trial before *Batson* was not ineffective for failing to raise a *Batson* type objection" because *Batson* departed from prior law). Rather, *Simmons* itself foreclosed *Cruz*'s reasoning and established that a *Simmons* request would have been meritorious—as this Court's summary reversal in *Lynch* proves. Preserving the issue merely required an examination of governing Supreme Court precedent concerning a critical aspect of capital sentencing. That is a basic duty of competent counsel.

3. The conclusion that trial counsel fell below a reasonable standard of performance is cemented by the fact that between 2008 (when *Cruz* issued) and 2016 (when *Lynch* issued), trial counsel in Arizona death penalty proceedings regularly raised and preserved *Simmons* and *Simmons*-type objections. Attorneys did so despite the fact that the Arizona Supreme Court regularly reaffirmed *Cruz*'s conclusion that *Simmons* did not apply in Arizona, thus leaving no doubt that a *Simmons* argument would not be accepted by the state courts and would have to be vindicated on federal review. See, *e.g.*, *State* v. *Dann*, 207 P.3d 604, 626 (Ariz. 2009); *State* v. *Chappell*, 236 P.3d 1176, 1187 (Ariz. 2010); *State* v. *Hargrave*, 234 P.3d 569, 583 (Ariz. 2010); *State* v. *Cota*, 272 P.3d 1027,

1042 (Ariz. 2012); *State* v. *Benson*, 307 P.3d 19, 32-33 (Ariz. 2013). Nonetheless, capital defense attorneys not only preserved *Simmons* arguments; they often pointed out that, contrary to *Cruz*'s reasoning, the theoretical availability of commutation or clemency under Arizona law was insufficient to render *Simmons* inapplicable.

In addition to the examples already provided by petitioner, Pet. 18 n.5, trial attorneys attempted to inform the jury of parole ineligibility in the cases below (listed chronologically, by the year in which the instruction was requested).

2009

- *State* v. *Cota*: Trial counsel sought a *Simmons* instruction that "under Arizona law there is no authority for releasing a defendant sentenced to life on *parole* (as opposed to the remote possibility of commutation or pardon.)." See Appellant's Opening Brief at 90, 272 P.3d 1027 (Ariz. 2012) (No. CR–09–0218–AP), 2011 WL 4361172.

2010

- *State* v. *Rose*: Trial counsel raised and preserved for appeal the argument that "refusal to permit evidence regarding a sentence of life without parole and ineligibility of any future release deprived Appellant of his rights under the Eighth and Fourteenth Amendments." See Appellant's Opening Brief at 99, 297 P.3d 906 (Ariz. 2013) (No. CR–10–0362–AP), 2011 WL 7910478.

2011

- *State* v. *Reeves*: Trial counsel "argued that if the State is allowed to present evidence of future dangerousness, the defendant should be allowed to present evidence that there is no mechanism for release presently in existence." See Appellant's Opening Brief at 42-43, 310 P.3d 970 (Ariz. 2013) (No. CR–11–0157–AP), 2012 WL 9171536.

- *State* v. *Burns*: Trial counsel raised and preserved on appeal the argument that "[f]ailure to advise the jury that Arizona has abolished parole and the only release if granted a life sentence is by commutation or pardon violates the Eighth and Fourteenth Amendments." See Appellant's Opening Brief at 146, 344 P.3d 303 (Ariz. 2015) (No. CR–11–0060–AP), 2013 WL 5403614.

- *State* v. *Goudeau*: Trial counsel raised and preserved on appeal the argument that "[f]ailure to advise the jury that Arizona has abolished parole and the only release if granted a life sentence is by commutation or pardon violates the Eighth and Fourteenth Amendments." See Appellant's Opening Brief at 188, 372 P.3d 945 (Ariz. 2016) (No. CR–11–0406–AP), 2014 WL 10297250.

2012

- *State* v. *Leteve*: Trial counsel raised and preserved on appeal the argument that "[f]ailure to advise the jury that Arizona has abolished parole and the only release if granted a life sentence is by commutation or pardon violates the Eighth and Fourteenth Amendments." See Appellant's Opening Brief at 86, 354 P.3d 393 (Ariz. 2015) (No. CR–12–0535–AP), 2014 WL 10297255.

2013

- *State* v. *Ketchner*: Trial counsel raised and preserved on appeal the argument that "[f]ailure to advise the jury that Arizona has abolished parole and the only release if granted a life sentence is by commutation or pardon violates the Eighth and Fourteenth Amendments." See Appellant's Opening Brief at 92, 339 P.3d 645 (Ariz. 2014) (No. CR–13–0158–AP), 2014 WL 3375464.

2014

- *State* v. *Hulsey*: Trial counsel whose client was not eligible for parole objected to jury instructions that "inaccurately advised the jury that if it sentenced Hulsey to life he would in fact someday be eligible for release short of commutation by the Governor, which has never occurred in the modern death penalty era." See Appellant's Opening Brief at 41-45, 408 P.3d 408 (Ariz. 2018) (No. CR–14–0291–AP), 2016 WL 4257718.

- *State* v. *Sanders*: Trial counsel "objected to the trial court advising the jury that a sentence of life included the possibility of release after 35 calendar years in prison was served." See Appellant's Opening Brief at 18-22, 425 P.3d 1056 (Ariz. 2018) (No. CR–14–0302–AP), 2016 WL 9244936.

In sum, trial counsel's failure to attempt to inform the jury of petitioner's parole ineligibility was a gross departure from reasonable standards of competence—whether or not counsel's performance is evaluated in light of *Cruz*. This Court's decision in *Lynch* leaves no doubt that had trial counsel preserved the issue, the failure to inform the jury of petitioner's parole ineligibility would have been a meritorious issue on direct appeal to this Court or on federal postconviction review. The *Simmons* right to inform the jury of parole ineligibility is, as this Court has recognized, essential to answering the prosecution's argument about future dangerousness. This Court's review is warranted to ensure that capital defendants are not deprived of that right solely because their attorneys unreasonably fail to invoke it.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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